

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

THE RETIRED PUBLIC
EMPLOYEES OF ALASKA, INC.,

Plaintiff,

v.

STATE OF ALASKA, DEPARTMENT
OF ADMINISTRATION, DIVISION
OF RETIREMENT AND BENEFITS,

Defendant.

3AN-18-06722CI

**ORDER DENYING RPEA'S MOTION TO ESTABLISH LAW OF THE CASE RE
STATE'S BURDEN OF PERSUASION AND PROOF**

Plaintiff, the Retired Public Employees of Alaska, Inc. (Plaintiff or RPEA), requests the Court establish the duty and scope of the burden of persuasion and proof that Defendant State of Alaska, Department of Administration, Division of Retirement and Benefits (Defendant or DRB) bears in this case. Specifically, RPEA requests the Court order DRB to fully disclose all changes made to the AlaskaCare Retiree Health Plan (Plan), in either its administration or the substance of coverage, since the end of 2013 so that the Court may conduct the *Duncan* analysis.¹ Second, RPEA alleges that the State's burden of proof in this case must be enhanced to clear and convincing evidence. Lastly, RPEA asserts that

¹ RPEA Mot. to Establish Law of the Case Re State's Burden of Persuasion and Proof, 9 (Apr. 19, 2021) [hereinafter RPEA Mot.].

the burden of proof must shift to DRB because, as the fiduciary, it is the party in control of key evidence.²

DRB opposes and argues that RPEA's motion is "nothing more than a renewed request that the court impose, as a matter of law, *a priori* review of changes that the [DRB]" made to the Plan.³ DRB asserts that the Court previously rejected the requirement that it must petition to the Court for review before implementing Plan changes. DRB also argues that there is no authority proffered to shift the burden of proof from RPEA to DRB.⁴

For the reasons that follow, the Court **DENIES** RPEA's motion.

Background

RPEA is a nonprofit corporation organized in Alaska for the benefit of retired public employees. The State of Alaska provides the Public Employees' Retirement System of Alaska (PERS), encompassing retirement benefits and an extensive health insurance policy. The health insurance is administered under the terms of the Plan. The State delegated the duties of administering the Plan to DRB. One of DRB's responsibilities is to select a third-party administrator to process claims made by retirees and their dependents.⁵ At the end of 2013, DRB selected Aetna as the third-party administrator of the Plan. To this day, Aetna remains the third-party administrator.

In 2018, RPEA filed a complaint alleging that DRB substantially changed the terms

² *Id.* at 10-11; RPEA Reply to Def.'s Opp. to Mot. to Establish the Law of the Case Re State's Burden of Persuasion and Proof, 5-7 (May 10, 2021) [hereinafter RPEA Reply].

³ Opp. to RPEA's Mot. to Establish Law of the Case Re State's Burden of Persuasion and Proof (May 4, 2021) [hereinafter DRB Opp.].

⁴ *Id.* at 9.

⁵ As plan administrator, DRB may enter into contract with a third-party administrator for benefit claims and payment. AS 39.30.090 – 39.30.095.

of the Plan, resulting in the diminishment and impairment of retirees' health insurance benefits.⁶ One concern of RPEA is that DRB replaced “substantially all of the provisions of the retiree dental benefits plan that had been in effect through 2013, replacing them with essentially a new and different plan provided and administered” and by “selecting [Aetna] as the third-party claims administrator of the Plan to process claims made by retirees and covered dependents and determine the benefits provided under the retiree medical, vision and audio benefit plans.”⁷ RPEA asserts that these changes substantially diminished and/or impaired the health insurance benefits and resulted in wrongful denials of previously covered benefits.⁸ RPEA provides a few examples of other changes since late 2013 that it alleges diminished or impaired the health benefits previously covered.⁹

Since initiating this action, the parties have engaged in extensive motion practice. In February of 2019, RPEA requested the Court determine the scope of DRB's fiduciary duties it owes to retirees.¹⁰ In April of 2020, Judge Aarseth issued an order outlining DRB's fiduciary duties owed to retirees.¹¹ The Court determined that DRB owed the following fiduciary duties to retirees: duty of good faith and fair dealing, loyalty and disavowal of self-interest, and due process.¹² Specifically, as it relates to Plan amendments

⁶ See Amended Compl. for Declaratory, Injunctive, Restitutionary and Other Relief at 5 (July 12, 2018).

⁷ *Id.* at 5-6.

⁸ *Id.*

⁹ *Id.* ¶ 21.

¹⁰ Mot. for Partial Declaratory J. and to Establish Law of the Case Re: The Scope of Fiduciary Duties Owed to the Beneficiaries of the AlaskaCare Retiree Health Care Plan by the Alaska Division of Retirement and Benefits (Feb. 26, 2019). In Alaska, a fiduciary relationship is inherent in every insurance contract, giving rise to an implied covenant of good faith and fair dealing. See *O.K. Lumber Co. v. Providence Washington Ins. Co.*, 759 P.2d 523, 525 (Alaska 1988).

¹¹ Order Re: Pl.'s Mot. for Partial Declaratory J. and to Establish Law of the Case Re: The Scope of Fiduciary Duties Owed to the Beneficiaries of the AlaskaCare Retiree Health Care Plan by the Alaska Division of Retirement and Benefits (Judge Aarseth, Apr. 13, 2020).

¹² *Id.*

that affect the substance of health benefits, DRB has the affirmative duty “to give notice and opportunity to be heard concerning proposed changes to Plan benefits or administration and to provide a statement regarding these changes and what the Defendant has done to offset the changes so that no benefit is diminished pursuant to *Duncan*.”¹³ As it relates to Plan administration, DRB owes the duties of good faith and fair dealing and loyalty and disavowal of self-interest.¹⁴

Before the Court is RPEA’s Motion to Establish Law of the Case. The scope of the motion at hand focuses on the burden of proof and burden of persuasion as to changes to the Plan since 2013.

Discussion

RPEA requests the Court order DRB to “fully and candidly disclose to the court the types of changes that it made to the Plan since the end of 2013 (including changes to Plan terms, changes in interpretation of Plan terms and changes in Plan administration that affected any Plan members); the purposes and expected effects of the changes; and then prove by clear and convincing evidence that none of those changes have resulted in any diminishment or impairment of any Plan medical coverages or other benefits, including but not limited to denials of any types of coverages or claims previously approved or paid by the Plan.”¹⁵

Article 12, section 7 of the Alaska Constitution protects retirement benefits of public employees: “Membership in employee retirement systems of the State or its political

¹³ *Id.*

¹⁴ *Id.*

¹⁵ RPEA Mot. at 9.

subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.”¹⁶ “Accrued benefits” encompasses “all retirement benefits that make up the retirement benefit package that becomes part of the contract of employment when the public employee is hired”¹⁷ – not just dollar amounts, “but the practical effect of the whole complex of provisions.”¹⁸ Accrued benefits arise by statute, the regulations implementing those statutes, and from DRB’s practices.¹⁹

When determining whether accrued benefits have been diminished or impaired, for purposes of article XII, section 7, Courts disregard “the form of the change...in favor of its impact.”²⁰ The Alaska Supreme Court has found constitutional violations in changes to eligibility rules,²¹ the method of calculating benefits,²² the financial soundness of the benefits system,²³ and the level of health care coverage provided.²⁴

In light of the Alaska Supreme Court’s liberal interpretation of article XII, section 7, it recognizes that retirement systems must allow for flexibility to be successful and to prevent them from becoming obsolete.²⁵ Modifications are permitted, however, any changes that disadvantage employees must be offset by comparable new advantages,²⁶ if they are not, disadvantaged individuals should be protected from the change and be allowed

¹⁶ AK CONST. ART. XII, § 7.

¹⁷ *Duncan v. Retired Pub. Employees of Alaska, Inc.*, 71 P.3d 882, 888 (Alaska 2003).

¹⁸ *Metcalf v. State*, 382 P.2d 1168, 1174 n.18 (Alaska 2016), *abrogated on other grounds by Hahn v. Geico Choice Ins. Co.*, 420 P.3d 1160 (Alaska 2018).

¹⁹ *McMullen v. Bell*, 128 P.3d 186, 190-91 (Alaska 2006).

²⁰ *Sheffield v. Alaska Public Employees’ Ass’n, Inc.*, 732 P.2d 1083, 1087 (Alaska 1987).

²¹ *Hammond*, 627 P.2d at 1058-59.

²² *Flisock v. State, Div. of Ret. & Benefits*, 818 P.2d 640, 643-44 (Alaska 1991).

²³ *Municipality of Anchorage v. Gallion*, 944 P.2d 436, 442-44 (Alaska 1997).

²⁴ *Duncan*, 71 P.3d at 886-89.

²⁵ *Id.*; *Hammond*, 627 P.2d at 1057-58.

²⁶ 627 P.2d at 1057.

to retain existing coverage.²⁷

In each case alleging a violation of article XII, section 7, the aggrieved party filed the complaint and specifically asserted that a change by DRB to the Plan was a disadvantage that was not accompanied by comparable new advantages. For example, in *Duncan*, three retiree organizations brought suit against DRB alleging that changes to the retirement health care plan diminished their protected benefits.²⁸ Similarly, in *Hammond*, participants in PERS brought suit against DRB alleging that specific changes to PERS were unconstitutional.²⁹ One challenge to PERS brought in *Hammond* was that “[t]he reduction of disability benefits for police officers and fire fighters from two thirds to two fifths of the appropriate monthly salary figure clearly operated to the disadvantage of the public safety employees who were effected.”³⁰ DRB conceded to this disadvantage under the new Plan terms but pointed to numerous advantages that accompanied this one disadvantage.³¹ DRB also provided the Court with projected data based on hypothetical cases under the new changes.³² The Court went through each challenged change to PERS and conducted the equivalency analysis to determine whether the change violated Alaska Constitution, Article XII, Section 7.

²⁷ *Duncan*, 71 P.3d at 892.

²⁸ 71 P.3d 882.

²⁹ 627 P.2d 1052.

³⁰ *Id.* at 1058.

³¹ *Id.* (“[DRB] points out, however, that prior to this change all workers’ compensation awards recovered by disabled public safety employees were set off against these disability benefits, whereas under the new system all employees are entitled to both workers’ compensation and disability benefits. [DRB] also notes that the time for receipt of benefits is accelerated. It argues that these changes are advantages to public safety employees which outweigh the disadvantage incurred in the reduction of the monthly disability benefits payable under PERS.”).

³² *Id.* The Court, however, disregarded this projected data because under *Hammond*, the Court was required to conduct an individualized analysis, rather than hypothetical cases. This individualized approach, as previously explained, was rejected by the *Duncan* Court. The *Duncan* Court adopted a group, collective approach.

This review of *Duncan* and *Hammond* leads the Court to deny RPEA's first request. The Court is tasked with determining whether modifications to the Plan since the end of 2013 attacked by RPEA has disadvantageous effects on retirees, and if so, to weigh those disadvantages against any advantages that may have accompanied them. Thus, RPEA should specifically assert each change to the Plan it believes resulted in a diminishment or detriment to their benefits. Retirees should have information on their benefits prior to the 2013 changes, as well as information of their benefits after Aetna was selected as the third-party administrator, or at least access to that information. RPEA must specifically allege that a change results in a serious hardship that is not offset by comparable advantages. Once RPEA makes this showing, DRB then has the burden of proving that the offset of advantages and disadvantages are supported by statistical data drawn from actual experience, by comparison of benefits provided.³³

Next, RPEA contends that because DRB is a fiduciary, its' burden of proof as to each allegation must be clear and convincing evidence, as opposed to the preponderance of the evidence.³⁴ RPEA relies on Judge Aarseth's April 13, 2020 Order where the Court determined that DRB owes retirees "the duty to give notice and opportunity to be heard concerning proposed changes to Plan benefits or administration and to provide a statement

³³ *Id.* at 882, 892 ("Coverage of a particular disease or condition should not be deleted, even though other coverage might be improved, if the deletion would result in serious hardship to those who suffer from the disease or condition in question. Moreover, if there should be changes that will predictably cause hardship to a significant number of beneficiaries who cannot at the time of the change be specifically identified, we believe that the option of providing an election to the beneficiaries to retain existing coverage should be available, at least in the absence of a showing by the state of a compelling need for the change and impracticability of providing for an election. Finally, changes that substantially reconfigure the mix of benefits to beneficiaries should be approved only by a strong showing of justification. Unusual gaps in coverage should be avoided.").

³⁴ RPEA Mot. at 8-11.

regarding these changes and what [DRB] has done to offset the changes so that no benefit is diminished pursuant to *Duncan*.”³⁵ RPEA wishes to expand this duty to DRB’s burden under *Duncan*, i.e., that the offset of any alleged advantages and disadvantages are supported by statistical data drawn from actual experience, by comparison of benefits provided.³⁶ A review of diminishment cases leads the Court to conclude that there is no authority that this Court must enforce a greater burden on DRB under the *Duncan* analysis. The Court therefore declines to impose a clear and convincing standard on DRB, as it pertains to its burden that alleged changes to the Plan are reasonable and pass constitutional muster under the comparative analysis of *Duncan*.

Lastly, RPEA asserts that the burden of proof must shift to DRB because, as a fiduciary, it is in control of all of the key evidence.³⁷ RPEA cites to numerous cases that hold that when evidence to prove a fact is within a party’s control, that party bears the burden of producing evidence.³⁸ Other than a conclusory statement that DRB holds all the key evidence,³⁹ RPEA fails to show that it lacks key evidence or that DRB indeed is in control of key evidence. DRB publishes information on the Plan to the AlaskaCare website and publishes health care booklets and pamphlets to retirees. It is unclear how, with this

³⁵ Order Re: Pl.’s Mot. for Partial Declaratory J. and to Establish Law of the Case Re: The Scope of Fiduciary Duties Owed to the Beneficiaries of the AlaskaCare Retiree Health Care Plan by the Alaska Division of Retirement and Benefits (Judge Aarseth, Apr. 13, 2020).

³⁶ This is one method that DRB can prove that new diminishments are offset by new advantages under *Duncan*. The Court acknowledges that there may be other methods to prove a showing of equivalency or lack of equivalency.

³⁷ RPEA Reply at 5-7. RPEA provides ample authority for situations where it is appropriate to shift the burden of proof: “where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue.” However, it appears that both parties have access to information relevant to the claims and issue at hand.

³⁸ RPEA Reply at 5-6.

³⁹ *Id.*


information publicly available, RPEA cannot look to the Plan prior to and after 2013 to point to specific changes to the Plan it believes fails to satisfy *Duncan*. Especially since RPEA has already pointed to specific changes to the Plan, for example in its complaint. Without this showing, the Court declines to shift the burden of proof.

Conclusion

The Court **DENIES** RPEA's Motion to Establish Law of the Case Re State's Burden of Persuasion and Proof.

IT IS SO ORDERED.

DATED at Anchorage, Alaska this 29th day of June, 2021.


ADOLF V. ZEMAN
Superior Court Judge

I certify that on 29 June, 2021, a copy
was mailed to:
G. Callan, J. Pickett, K. Dilg
Elisabeth Escobedo, Law Clerk